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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c); E.O. 12979, 60 FR 55171, 3 CFR, 1995 Comp., p. 417.

SOURCE: 69 FR 22991, Apr. 27, 2004, unless otherwise noted.

Subpart 2933.1—Protests

2933.102 General.

(a) The Division of Acquisition Management Services, 200 Constitution Ave., NW., S-1513 B, Washington, DC 20210-0001, telephone (202) 693-7285, facsimile (202) 693-7290 (or the Office acting in that capacity), is responsible for coordinating procurement protests filed with the General Accounting Office.

(b) The authority of the Assistant Secretary for Administration and Management under FAR 33.102(b) to determine that a solicitation, proposed award, or award does not comply with the requirements of law or regulation may be delegated to the HCA.

2933.103 Protests to the agency.

(a) In accordance with Executive Order 12979, the following procedures apply to agency protests:

(1) The filing time frames in FAR 33.103(e) apply to agency protests. An agency protest is filed when the protest complaint is received at the location the solicitation designates for serving protests; or if none is designated, when filed with a contracting officer or HCA.

(2) An interested party filing an agency protest may request either that the contracting officer or the Agency Protest Official decide the protest. The "Agency Protest Official" is an individual above the level of the contracting officer and designated by the Assistant Secretary for Administration and Management, such as the Competition Advocate. The deciding official, whether a contracting officer or Agency Protest Official, must work in consultation with the Office of the Solicitor to resolve the protest.

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(3) In addition to the information required by FAR 33.103(d)(2), the protest must:

(i) Indicate that it is a protest to the agency;

(ii) Be contemporaneously filed with the contracting officer;

(iii) State whether the protestor chooses to have the contracting officer or the Agency Protest Official decide the protest. If the protest is silent on this matter, the contracting officer will decide the protest.

(b) "Interested Party" means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(c) If the Agency Protest Official is chosen by the protestor to decide the protest, this is an alternative to a decision by the contracting officer, not an appeal. The Agency Protest Official will not consider appeals from a contracting officer's decision on an agency protest.

(d) The deciding official should consider conducting a scheduling conference with the protestor within five (5) days after the protest is filed. The scheduling conference will establish deadlines for written arguments in support of the agency protest and for agency officials to present information in response to the protest issues. Alternative Dispute Resolution techniques will be considered if determined appropriate by the deciding official.

(e) Oral conferences may take place either by telephone or in person. Other parties may attend at the discretion of the deciding official.

(f) Apart from its protest document, the protestor will be given only one opportunity to support or explain in writing the substance of its protest. Department of Labor procedures do not provide for any discovery. The deciding official has discretion to request additional information from either the agency or the protestor. However, the deciding official will normally decide protests on the basis of information provided by the protestor and the agency.

(g) The preferred practice is to resolve protests through informal oral discussion.

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(h) An interested party may represent itself or be represented by legal counsel. The Department of Labor will not reimburse the protester for any legal fees or costs related to the agency protest.

(i) If an agency protest is received before contract award, the contracting officer may only make award if the HCA makes a determination to proceed under FAR 33.103(f)(1). Similarly, if an agency protest is filed within ten (10) days after award, or within five (5) days of the offer of a debriefing required by FAR 15.505 or 15.506, whichever is later, the contracting officer must suspend performance of the contract unless the HCA makes a determination to proceed under FAR 33.103(f)(3). Any stay of award or suspension of performance remains in effect until the protest is decided, dismissed, or withdrawn.

(j) The deciding official must make a best effort to issue a decision on the protest within twenty (20) days after the filing date. The decision may be oral or written, dependent upon advice of legal counsel.

(k) The deciding official must send a confirming letter within three (3) days after the decision using a means that provides evidence of receipt. The confirming letter must include the following information:

(1) State whether the protest was denied, sustained or dismissed.

(2) Indicate the date the decision was provided.

(3) If the deciding official sustains the protest, relief may consist of any of the following:

(i) Recommendation that the contract be terminated for convenience or cause, or that the solicitation be canceled.

(ii) Recompeting the requirement from the beginning of the solicitation or from the last round of negotiations.

(iii) Amending the solicitation.

(iv) Refraining from exercising contract options.

(v) Awarding a contract consistent with statute, regulation, and the terms of the solicitation.

(vi) Other action that the deciding official determines is appropriate.

(l) If the deciding official sustains a protest, then within 30 days after re-

ceiving the official's recommendations for relief, the contracting officer must either:

(1) Fully implement the recommended relief; or

(2) Notify the deciding official, if the contracting officer was not the deciding official, in writing, if any recommendations have not been implemented and explain why.

(m) If the protest is denied, and contract performance has been suspended under paragraph (i) of this section, the contracting officer will not lift such suspension until five (5) days after the protest decision has been issued, to allow the protester to file a protest with the General Accounting Office, unless the HCA makes a new finding under FAR 33.103(f)(3). The contracting officer shall consider allowing such suspension to remain in effect pending the resolution of any GAO proceeding.

(n) Proceedings on an agency protest may be dismissed or stayed if a protest on the same or similar basis is filed with a protest forum outside of the Department of Labor.

2933.104 Protests to GAO.

(a) *General procedures.* The HCA has the responsibility to prepare and provide to the General Accounting Office (GAO) the agency report with the information required by FAR 33.104(a). The agency report must be coordinated with the Office of the Solicitor before the report is signed and sent to the GAO.

(b) *Protests before award.* The authority of the HCA under FAR 33.104(b) to authorize a contract award when the agency has received notice from the GAO of a protest filed directly with the GAO is nondelegable. The HCA has the responsibility to prepare and provide to the GAO the written finding with the information required by FAR 33.104(b)(1). The written finding must be coordinated with Office of the Solicitor before the HCA affirms its approval by signing the written finding and sending it to the GAO. Copies of the signed written finding and the signed written notice to the GAO must be provided to the Senior Procurement Executive within two (2) working days after they are sent to the GAO.